IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CENTRAL EXCISE & CUSTOMS GOLD CONTROL AP No 88 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

M/S.MAHALAXMI SHIP BREAKING CORPN.
Versus
CUSTOMS, EXCISE & GOLD (CONTROL)

Appearance:
1. CENTRAL EXCISE & CUSTOMS GOLD CONTROL AP No. 88 of 2002
MR ANILKUMAR D MARU for Petitioner No. 1
MR DN PATEL for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE D.A.MEHTA

Date of decision: 03/09/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

This is an application filed by the applicant, a partnership firm seeking direction that the following questions of law arise out of the order of CEGAT dated 17th June, 2002.

1. If the Party had not filed an Appeal against the part of the order denying him relief, but prayed for such relief in the Appeal filed by the Department in filing cross-objection before the Commissioner (Appeals), but if the Commissioner (Appeals) failed to consider the same, whether CEGAT can grant such relief to the party, or otherwise?

2. At the time of hearing of the cross-objection filed by the party, if he prayed for the relief in written submissions, before the Commissioner (Appeals), but the Commissioner (Appeals) failed to consider the written submissions, whether CEGAT can grant such relief prayed in the written submissions to the party, or otherwise?

3. If the Assessing Officer failed to extend the benefit of exemption Notification, which the party claimed later at the Appellate stage, when he came to know, whether that benefit is available to the party or otherwise?

4. Written submissions given by the party at the time of cross-objection hearing, whether such written submissions can be considered as part of cross-objection or otherwise?

5. Even otherwise, whether the benefit of exemption Notification can be available to the party, if he prayed during the proceeding pending at the Appellate stage or otherwise?

2. The facts in brief are that the applicant, who is engaged in ship breaking activity, imports old vessels for breaking. Admittedly, the said vessels fall under the heading 89.08 of the First Schedule to the Customs Tariff Act. The bill of entry dated 5th November, 1990 was filed and the same was assessed on 14th November, 1990 directing the applicant to remit duty amounting to Rs. 59,64,396/- . The applicant-assessee paid the said amount of custom duty on 16th November, 1990.

3. On 7th May, 1991, the Superintendent of Customs, SBY - Alang issued a show cause notice proposing recovery of an amount of Rs. 2,07,168.28 towards duty in respect

of movable gears, stores and bunkers. The adjudication order dropped the demand of duty to the extent of Rs. 1,71,209.47 towards duty on movable gears and stores, which under the circular No. 37/1996 dated 3rd July, 1996 issued by the Central Board of Excise and Customs are required to be assessed with the vessel under chapter heading 89.08 of the Customs Tariff Act. The remaining demand to the extent of Rs. 35,458.81 relating to bunker, fuel and oil was confirmed and assessed under the appropriate heading. The Revenue filed an appeal before the Commissioner (Appeals) challenging the order of adjudication dropping the demand on stores. The applicant-assessee filed cross objections before Commissioner (Appeals) in relation to the demand to the extent of Rs. 35, 458.81. The Commissioner (Appeals) dismissed the appeal filed by the Revenue and also the cross objections filed by the assessee.

4. The assessee preferred an appeal before the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi which came to be registered as Appeal No. C/276/2002-B. The principal grievance raised by the assessee before the Tribunal was that in the written submissions filed before the Commissioner (Appeals), in support of the cross objections, the assessee had contended that it was entitled to benefit of Notification No. 118/89-Cus dated 1st March, 1989 and Notification No. 169/89-Cus dated 12th May, 1989 in the assessment of vessel. Reliance was also placed on Notification No. 87/90-Cus dated 20th March, 1990 contending that duty in respect of vessel is calculated on metric tones and not as per light displacement tonnage. In short, the say of the assessee was that it had wrongly been assessed at a figure of Rs. 59,64,396/- on 14th November, 1990.

5. The Tribunal dismissed the appeal holding that the assessee could not have filed an appeal challenging the rate or quantum of assessment of the vessel since it was not an issue before the adjudicating authority when the order in original was passed on 29th February, 1998. It was further held by the Tribunal that the contentions regarding the rate of duty and the quantum of duty on the vessel raised before the Commissioner (Appeals) in an argument note would not enable the Commissioner (Appeals) to decide the question since it was not an issue in the proceeding before him. It was further held by the Tribunal that assessment regarding the vessel had become final as early as in 1990 and the assessee could not have challenged the said assessment by way of a cross appeal filed in 1999. Accordingly, the appeal filed by the assessee came to be dismissed.

6. Assailing the aforesaid order of the Tribunal, Mr. Maru, learned advocate for the applicant, submitted that the question of law arose as to whether it was open to a party to claim benefit of exemption notification, if the same was claimed during proceedings pending before an appellate authority. Mr. D.N. Patel, learned advocate appearing on behalf of the respondent raised a preliminary objection that the entire case of the applicant - assessee was misconceived as there was no provision for filing cross objection before the Commissioner (Appeals), and in absence of such a right being available to the assessee, there is no question of the assessee raising any dispute before the Commissioner (Appeals). The learned advocate for the applicant, Mr. Maru invited attention to the provision of Section 129D of the Customs Act, 1962 with special reference to Sub Section 4 of the said Section to point out that it was open to an aggrieved party to file a cross objection and the preliminary objection was not sustainable. Section 129D, which deals with powers of the Board or the Commissioner of Customs, specifically empowers under Sub Section 2, the Commissioner of Customs, to direct the authority to apply to the Commissioner (Appeals) for the determination of such points which may arise out of the decision or an order as specified. Sub Section 4 of the said Section specifically incorporates provisions of Section 129A(4) of the Act whereunder it is open to a party to file cross objection in support of an order before the Tribunal. Thus, by the principle of incorporation, the right to file cross objection has been specifically provided in the statute and the preliminary objection fails.

7. Mr. Maru, in support of his submissions, places reliance upon the following decisions 1983 E.L.T (13) 1566 (S.C.) DUNLOP INDIA LTD. & MADRAS RUBBER FACTORY LTD. Vs. UNION OF INDIA AND OTHERS, 1993 (68) E.L.T. 292 (Kar.) INDO NISSIN FOODS LTD. Vs. UNION OF INDIA, 1991 (51) E.L.T. 176 (S.C.) JUTE CORPORATION OF INDIA LTD. Vs. COMMISSIONER OF INCOME TAX, 1991 (51) E.L.T. 631 (S.C.) ASSISTANT COLLECTOR OF C.EX. Vs. RAMDEV TOBACCO COMPANY as well as certain portions from a book by one Shri V.T. Raghavachari on Appellate Remedies Under Excise and Customs. It was contended by Mr. Maru that in taxation matters, there is no estoppel in law against a party and merely because the party had accepted a certain position and treated a portion of item falling within one entry, the classification accepted under some misapprehension cannot bind the party, once the party becomes aware of the correct legal position. It was

further contented that notifications issued under Section 25 of the Act are binding on the assessing authority and cannot be ignored while levying the duty and any such assessment, which ignores notification issued under Section 25 of the Act, would be an illegal collection rendering the assessment violative of Article 265 of the Constitution. It was further contended that raising of an additional ground is always permissible and an appellate authority is required to exercise discretion while deciding whether the additional ground should be entertained or not. What was the scope of cross objection and cross appeal was pointed out by placing reliance on Chapter 8 of the aforesaid book of Shri. V.T. Raghavachari.

8. We have no quarrel with any of the legal propositions canvassed by Mr. Maru. The question however is, whether any of the legal propositions are available so as to be pressed into service in the set of facts and circumstances which obtain in the present case. It is a settled legal position that the powers of appellate authority are coterminous with that of the assessing authority in relation to the matter of assessment and hence any ground that could be raised before the assessing authority, but was not raised, could be raised before an appellate authority. Similarly, a party which has succeeded partly before an authority may file cross objections in relation to that part of the order, against which no appeal had been preferred, in a case where the other party prefers an appeal. However, such cross objections can be filed only by the person who would be independently entitled to file an appeal against an order. In absence of any right of appeal, a person cannot circumvent such a disability by taking recourse to filing cross objection. Similarly, an additional ground or a plea in the matter of assessment could be raised before an appellate authority provided it was open to the assessee to raise the said ground or plea during the course of assessment.

9. In the present case, as the facts on record go to show, the assessment in relation to vessel had been finalised on 14th November, 1990. The assessee had duly paid up the duty without demur on 16th November, 1990. The said assessment had not been challenged in any manner whatsoever. The Superintendent of Customs issued show cause notice on 7th May, 1991 proposing recovery of duty in respect of movable gears, stores and bunkers. The adjudication order dated 29th February, 1998 dropped the demand of duty in relation to movable gears and stores while retaining demand of duty relating to bunker, fuel

and oil. Therefore, there was no occasion for the assessee to raise the issue regarding assessment of vessel, which had already become final, in the proceedings which commenced with the issuance of show cause notice dated 7th May, 1991. In these circumstances, the assessee could not have filed an appeal independently against the adjudication order dated 29th February, 1998 in relation to assessment of vessel, which had become final on 14th November, 1990. If the assessee was prevented from filing an appeal independently, it could not have raised the said issue in cross objections filed in an appeal preferred by the Department before the Commissioner (Appeals). In fact, the assessee did not take any such ground in the cross objections filed by the assessee. It was only during the course of hearing, when written submissions were filed in support of the cross objections that the assessee raised the issue regarding assessment of vessel by placing reliance upon various notifications which have been referred to hereinbefore. The appellate authority did not consider the said submission, and rightly so in our view, while disposing of the appeal and cross objections. The assessee's appeal before the Tribunal was also correctly rejected by the Tribunal as firstly, there was no finding of the appellate authority regarding assessment of vessel which could have been challenged before the Tribunal; secondly, the assessee could not have raised the said issue before the appellate authority either by way of independent appeal or cross objection; and thirdly, the assessee had merely raised a contention in writing in support of the cross objection which did not contain any ground as regards the assessment of vessel which had already become final on 14th November, 1990.

10. The position of law is well settled that an assessing officer's jurisdiction in cases of reassessment is confined only to such income which has escaped tax or has been underassessed and does not extend to revising, reopening or reconsidering the whole assessment or permitting the assessee to agitate questions which have been decided in the original assessment proceedings. Claims, which have been disallowed in the original assessment, cannot be permitted to be reagitated on the assessment being reopened for bringing to tax certain income which has escaped assessment because the controversy in reassessment proceedings is confined to matters which are relevant only in respect of the income which had not been brought to tax during the course of the original assessment. This is the ratio enunciated by the Supreme Court of India in the case of COMMISSIONER OF

INCOME-TAX Vs. SUN ENGINEERING WORKS P. LTD. (1992) 198 I.T.R. 297.

11. In the circumstances, we find no infirmity in the order of the Tribunal which would give rise to a question of law requiring this Court to issue direction to the Tribunal to raise and refer the same.

This application, therefore, stands rejected. Rule discharged. There shall be no order as to costs.

(A.R. DAVE,J.)

(D.A. MEHTA,J.)

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